

MEMORANDUM OF LAW

DATE: May 5, 1986

TO: Bruce Herring, Risk Management Director via
John Fowler, Deputy City Manager

FROM: City Attorney

SUBJECT: AIDS Housing Discrimination Ordinance

As a result of a recent recommendation from the Mayor's Task Force on Acquired Immune Deficiency Syndrome (AIDS), you have asked this office to advise you if The City of San Diego has the legal authority to enact an ordinance barring housing discrimination based on a person being afflicted with AIDS or if such an ordinance is preempted by state law. Attached to your memorandum was City Manager's Report No. 86-7 which indicated that the AIDS problem in San Diego has not reached the magnitude of that in San Francisco or Los Angeles, but that the AIDS caseload in San Diego has more than doubled since 1984 and is expected to reach 400 by 1986-87. In recognition of the problem in Los Angeles and San Francisco, both of those cities enacted AIDS discrimination ordinances. The Mayor's Task Force on AIDS has requested that The City of San Diego enact a similar ordinance. This memorandum of law addresses only the issue of preemption.

After reviewing the provisions of the Fair Employment and Housing Act (Gov't Code Sec. 12900, et seq.) we initially advised you that section 12940 of the Gov't Code specifically prohibits employment discrimination based on "physical handicap." We stated the belief that this term encompasses AIDS because the California Supreme Court has broadly interpreted this term to include any "physical condition" that, whether actually or potentially handicapping, presents no current job disability or job related health risk. *American National Ins. Co. v. Fair Employment and Housing Com.*, 32 Cal.3d 603, 186 Cal.Rptr. 345, 651 P.2d 1151 (1982). However, because section 12955 of this Act relating to housing discrimination does not contain the term "physical handicap" further research would be necessary before we could advise you as to whether or not The City of San Diego could validly enact an ordinance prohibiting housing discrimination based on AIDS.

After a thorough review of the laws of the State of California pertaining to housing discrimination, we believe that the State of California, by the provisions of section 54.1 of the

Civil Code has preempted the field of housing discrimination against "physically disabled" persons; however, as presently written, neither the provisions of the Fair Employment and Housing Act (Gov't Code Sec. 12900, et seq.) nor the provisions of the Unruh Civil Rights Act (Civil Code Secs. 51-53) prohibits The City of San Diego from adopting an ordinance prohibiting housing discrimination against individuals who have AIDS or any other "physical handicap" as that term is used in section 12940 of the Gov't Code.

In *San Jose Country Club Apartments v. County of Santa Clara*, 137 Cal.App.3d 948, 187 Cal.Rptr. 493 (1982) the court ruled that the combined effect of the California Fair Employment and Housing Act and the Unruh Civil Rights Act did not preempt the entire field of housing discrimination and that local agencies were free to supplement the provisions of these statutes with local regulatory schemes prohibiting discrimination based on age, parenthood, pregnancy or the presence of a minor child. On the other hand, local agencies may not adopt additional regulations concerning the types of unlawful discrimination specifically found in the Fair Employment and Housing Act. The California Supreme Court in *Morena Point Ltd. v. Wolfson*, 30 Cal.3d 721, 180 Cal.Rptr. 496, 640 P.2d 115 (1982) has also extended the protection of the Unruh Civil Rights Act to all persons suffering from all forms of arbitrary discrimination by business establishments which includes individuals in the business of renting, selling or leasing property. We therefore believe that the Unruh Civil Rights Act, which clearly provides AIDS victim with a remedy from arbitrary discrimination, is not a preemptive statute.

However, what has not been adequately addressed by the above cases is the effect of Civil Code Sec. 54.1 on the issue of state preemption. That section strictly prohibits housing discrimination against "physically disabled person" but does not contain a provision permitting local regulation as does the Unruh Civil Rights Act. Unfortunately, the Civil Code provides no definition of the term "physically disabled person."

Further complicating this issue is the fact that while California courts have established the tradition of broadly interpreting the provisions of antidiscrimination ordinances to achieve the goals of an enlightened society, no court has ruled on the exact legal status of a person who is afflicted with AIDS.

In fact, at the present time, the only reported case on this point is *Shuttleworth v. Broward County Office of Budget and Management Policy*; Florida Commission on Human Relations, FCHR

Case No. 85-0624, dated December 11, 1985. In that case, it was determined that an individual with AIDS was a victim of handicap discrimination.

There are also no traditional guidelines addressing the difference, if any, between an individual with a "physical handicap" as that term is used in the Fair Employment and Housing Act and a "physically disabled person" as that term is utilized in Civil Code Sec. 54.1. However, because the California Supreme Court broadly interpreted the term "physical handicap" in section 11540 of the Government Code in *American National Ins. Co. v. Fair Employment and Housing Com.*, 32 Cal.3d at 610 it can be strongly argued that the term "physically disabled" found in section 54.1 will also be broadly interpreted by the courts.

There is strong support for the argument that the state has preempted the field of housing discrimination against "physically disabled persons." The court in *Marsh v. Edwards Theatre Circuit, Inc.*, 64 Cal.App.3d 881, 134 Cal.Rptr. 844 (1976) indicated that local entities may be preempted from enacting additional regulations in this area when it declared:

Finally the enactment of Civil Code Secs. 53.3 and 55 providing for public prosecution and private injunctive relief for violations of Civil Code Sec. 54.1 evidences a legislative intent that those remedies are to be exclusive and that the damages provided for in section 52 are not recoverable for a violation of Civil Code Sec. 54.1. ¶Emphasis added.σ

It therefore appears that the remedies of Civil Code Sec. 54.1 are exclusive and it would be impossible for The City of San Diego to draft an ordinance covering the same subject matter without being in conflict with the state law. Such an ordinance would be invalid. *Bishop v. City of San Jose*, 1 Cal.3d 56, 460 P.2d 137, 81 Cal.Rptr. 465 (1969).

It is clear from the above analysis that because the state has preempted the field of housing discrimination against "physically disabled persons," section 54.1 provides the exclusive remedy against discrimination in housing for an individual with AIDS who is presently "physically disabled."

What is less clear and cannot be answered specifically at this time is whether or not the courts will interpret the term "physically disabled person" to include individuals with AIDS who are not presently disabled. At the present time, therefore, it

does appear that The City of San Diego has the authority to enact an ordinance protecting that specific class of individuals from housing discrimination.

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By

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